FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 514.

MARVIN ROTH,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

MORRIS A. SHENKER,
BERNARD J. MELLMAN,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street, CEntral 1-1423.

INDEX.

	Page
Argument	1
Conclusion	4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 514.

MARVIN ROTH,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

The Government in its brief in opposition (p. 9) states that the evidence disclosed a ready complaisance on petitioner's part to make the paregoric sales charged in counts 1 and 2 of the information. Whether the petitioner showed a readiness and willingness to sell the narcotic paregoric or whether he was in fact induced and entrapped into making such sales, is the very heart of

this case, and in this respect petitioner submits that the Government has misstated the evidence and has completely omitted from its Statement and Argument the fact that petitioner expressed not only an unwillingness but an outright refusal to become engaged in the sale of paregoric.

The Government admits in its brief (p. 6) that in the conversations between the government agent and petitioner the first mention of the narcotic paregoric was made by the government agent, but the Government states that this agent merely mentioned that a third person (actually a fictitious person) had asked the agent about obtaining some paregoric, but that the government agent did not want to have anything to do with it or take a chance. The Government states that at this point petitioner merely said, "I know what you mean. * * * you can get two to three" years for selling it. Whereupon the agent agreed and said that it was not worth the risk (Government's brief, p. 6).

According to the record in this case, what actually happened is that the agent first brought up the question of narcotics to the petitioner, and said that one McCoy had asked the agent about getting the narcotic paregoric, whereupon petitioner said that the handling of narcotics was dangerous, **and that he would not want to take a chance on the narcotic.** This express refusal on petitioner's part, to become involved in the narcotic traffic, completely omitted from the Government's brief, is contained in the record not only in petitioner's evidence, but as well in the Government's evidence. So important do we believe this factor to be in the determination of the ultimate issue in this case, that we quote from the trial testimony the following portion of the examination of **Government witness** L. J. Cramer, the government agent who first discussed the paregoric sale with petitioner (R. 87 et seq.):

"Q. Now, what did you tell him about paregoric on that occasion?

A. Well, I told him that McCoy had asked me about getting some, and I advised him I didn't want to get mixed up in it. Marv said, I know what you mean, it is tough, it could mean two or three.

Q. Didn't he also say at that time he didn't want to get involved with paregoric?

A. Well, do you want to continue?

Q. Just answer my question.

A. No, I don't think he did.

Q. All right.

A. Yes, I think more or less he implied a little bit that way.

Q. Well, you have been reading from a statement you made, a report you made.

A. I have been refreshing my memory from it.

Q. Directing your attention to your report dated January 15, 1957, would you look at the bottom of the last paragraph?

A. Yes, sir.

Q. Where it said that you had told him that McCoy had asked you about getting him some paregoric, and the last two sentences are that Mr. Roth stated, however, that it was dynamite, that it means the Feds., he said this other stuff is not bad, meaning tablets, **but that he would not want to take a chance on the PG.**

A. **That is what I have.**

Q. **That is true, is it not?**

A. **That is right.**

Q. You did not read this part of the report in your direct examination.

A. I had not come that far, I was reading.

Q. I said, in your direct examination you had not read that part of your report at all.

A. No.

Q. And you were not interrogated on that part.

A. I was not.

Q. **So on the first occasion that any discussion was had relative to paregoric Mr. Roth told you that he did not want to quote "take a chance on the PG", end quote. He told you that, did he not?**

A. **He said what you read.**

Q. **Well, that is so, here it is in your report, isn't it?**

A. **Yes, sir. . . .**

Q. **So it is clarified, he said that he himself, Mr. Roth, did not want to take a chance with the paregoric.**

A. **That is what he said, yes."** (Emphasis ours.)

Petitioner submits that it cannot be fairly contended that the foregoing evidence shows a ready complaisance on the part of petitioner to engage in the narcotic traffic. Rather it shows an innocent person, actually refusing and reluctant to engage in such traffic, and when this crucial testimony is considered with all of the remaining evidence, it is clear that this is a case where representatives of the Government have implanted into the mind of an innocent person the disposition to commit an offense so that a prosecution may result.

CONCLUSION.

For the reasons set out herein and those set out in the petition, it is urged that the writ of certiorari should be granted.

Respectfully submitted,

MORRIS A. SHENKER,
BERNARD J. MELLMAN,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.